NO. 3038

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CAROLINE J. ROBINSON,

Plaintiff-in-Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors under the Will of ELIZA ROY, deceased,

Defendants-in-Error.

BRIEF FOR DEFENDANTS IN ERROR

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Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR DEFENDANTS IN ERROR

As plaintiff, in her opening brief, has stated the facts fully, we will confine our argument to a discussion of the law involved.

ARGUMENT.

Plaintiff calls attention to the fact that the trial court and Supreme Court differed as to the validity of the CONDITION SUBSEQUENT of said release; the lower court holding it void, the Supreme Court holding it valid.

As the invalidity of the condition subsequent of said release was the main point relied upon by the defendants at the trial of cause, we will take the liberty of citing authorities in support of our contention *that the condition subsequent was void and the release absolute.*

AUTHORITIES HOLDING CONDITION SUBSEQUENT VOID AND RELEASE ABSOLUTE.

In the case of *Fitzsimmons v. Ogden,* 7 Cranch 219 (Law Ed. 355), the court, in speaking of the effect of a release, said:

"But it is contended that the consideration for the release was the trust declared by G. Morris in August, 1799, or acquiesced in by him under the agreement of the 16th of September, and that his breach of trust in selling the judgment to the Holland Co. with a view to the intended purchase of the lands in dispute by them, did away with the effect of the release previously executed by R. Morris. That this was a legel consequence of the breach of trust can scarcely be maintained. *The release being once regularly executed and delivered, could never afterwards be avoided at law by failure of one of the parties to perform an act in consideration of which the release was given.* It could extend no further than to charge G. Morris with a breach of contract, for which he might be personally liable to the party aggrieved."

The same is true of the case at bar. The failure of Mrs. Roy to perform the acts in consideration of which the release was given, would not avoid the release and such a breach could extend no further than

to charge Mrs. Roy with a breach of contract, for which she would be personally liable.

The court in discussing the effect of a release in the case of *Kingsley v. Kingsley,* 20 Ill. 203, 208, said:

"The controversy in this case grows out of the execution of the release set up by the complainant in his bill and charged to have been executed by the defendant to him. It is no doubt true, and was the agreement, that the notes, on the execution and delivery of which by the complainant to the defendant, the release was executed, should be signed by Francis P. Kingsley as security, both parties expected it. But it was not done; he refused to sign them when presented to him by defendant for that purpose. The release was executed on the delivery of the notes and there is no fraud shown either in the execution or delivery. The most that can be said is that the complainant did not perform his contract, but that does not render the release ineffectual. *The release being once fairly and regularly executed and delivered, could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given.* It could go no further than to charge the complainant with a breach of contract for which he would be liable." Citing *Fitzsimmons v. Ogden et al.,* 7 Cranch 219.

The case above cited seems to us to be "on all fours" with the case at bar. The release was executed under the understanding and agreement that the notes would be signed by Francis P. Kingsley as security. The notes were never signed by Francis P. Kingsley, but nevertheless the court held that it did not avoid the release and that the only right of action the plaintiff had was for a breach of contract.

In the case at bar, when the plaintiff released and discharged the notes she held against Mrs. Roy, *the release was absolute and the notes could not be revived* by the failure of Mrs. Roy to keep the promise which was made in consideration of the release.

The case of *Byrd Printing Co. vs. Whitaker Paper Co.*, 70 S. E. 799, also squarely upholds our contention.

The lower court, in rendering its decision in favor of the defendants, laid great stress upon the case of *Tyson v. Dorr,* 6 Whart. (Pa.) 255, 262-3, which we believe upholds the judgment of the lower court.

In the case of *Tyson v. Dorr,* the court said:

"In *Agnew v. Dorr,* 5 Whart. 131, the assignment required a full and complete release by the creditors. A condition inserted in his release by a creditor, that he should receive twenty-five per cent of his debt, was held to be bad, as not in compliance with the terms of the assignment, and as throwing on the assignees difficulties and embarrassments incompatible with the execution of their trust. But in that case there was no release executed; there was merely a letter written by the creditor, agreeing to become a party to the assignment and release, on condition of the fund paying twenty-five per cent of his claim. This was held to be in its nature merely an executory agreement which could not be enforced without a consideration, and as the creditor could not come upon the fund, his agreement to release would not be enforced. In the present case there is not merely an executory agreement, but a technical release, executed under hand and seal; and the result is different. For, as is said in *Agnew v. Dorr,* it is certain that a technical release will discharge a duty at law, without consideration, and that chancery will not relieve against it, where the releasor has acted with

full knowledge of all necessary circumstances. The release, therefore, is in the present case clearly binding.

"If, then, the release be binding and the condition inoperative, by reason of its repugnancy to the terms of the assignment, and the impossibility that it should be performed, the consequence is, that the release remains single and absolute, and extinguishes the debt. For the principle of law has long been settled, that if one gives an obligation, with condition to be void on the performance of that which is impossible at the time of its execution, the bond is single and it is the same as if there were no condition at all. * * *

"Now, the condition of this release is, that the assignment pays over twenty-five per cent of the claim. But this could never be; for the assignees could not divert the funds from their appropriate channel, which was first to the preferred creditors; next amongst those who executed perfect releases; and lastly, to the assignors. Under no possible circumstances could the assignment pay the releasors anything whatever, if they did not release according to the terms of the assignment; nor could the assignees voluntarily pay any portions, without a breach of their trust, which the law will not suppose beforehand, nor recognize when done as valid in its operation.

"Again, a man cannot release a personal action as an obligation, with a condition subsequent, but the condition will be void; for a personal action once suspended, is extinguished forever: 1 Rol. Ab. 412. For instance, a release, if once operative, cannot be avoided; so that one may make a release to operate on a contingency, but cannot make a release to be void on a condition: 1 Inst. 274, b. *A thing once extinguished cannot be revived; or, in other words, if the release be on a condition subsequent, the release is good, and the condition void;* 2 Shep. Touch. by Preston, 325; Law. Lib. 91st, Part 154. The present is not an instrument by which on a future contin-

gency the release is to become operative; but a release first with a condition which is intended to defeat it subsequently, if the releasor should not receive twenty-five per cent, and the release remains binding, though such condition be never performed."

Tyson vs. Dorr, 6 Whart. (Pa.) 255, 262-3.

The language of the agreement of the release is so very clear and explicit that it should leave no doubt in the minds of the court that the intent of the parties was that the notes were to be satisfied and canceled, and that the promise on the part of Mrs. Roy not to mortgage or transfer her property or incur an indebtedness exceeding the sum of $1000.00, without the consent of plaintiff, was only a consideration for the execution of the release.

The language of the release shows clearly that Mrs. Roy and plaintiff, by said so-called release, came to an accord concerning the previous execution of the notes in question and also came to a satisfaction of said notes. The law is well settled that an accord and satisfaction wipes out and discharges the obligation in respect to which the accord and satisfaction are arrived at. An accord and satisfaction generally includes a new agreement, i. e., that the creditor shall accept some different character of payment or of services from the debtor than the sum or services provided for in the original agreement.

The plaintiff, in consideration of $10.00, released and discharged the notes. The agreement of Mrs. Roy not to sell or mortgage her property or to incur an indebtedness exceeding $1000.00 was simply an

additional consideration for the release and discharge and could not, by the most violent construction, revive the notes in the event Mrs. Roy violated her agreement with plaintiff by selling or mortgaging her property or incurring an indebtedness exceeding $1000.00.

ESTOPPEL.

The ratification by plaintiff of the transfers made by Mrs. Roy subsequent to the execution of the release in question, naturally led Mrs. Roy to believe that plaintiff no longer relied upon the clause in the release providing that she (Mrs. Roy) should not sell or mortgage her property, or incur an indebtedness amounting to more than $1000.00 without the written consent of plaintiff. It must be evident to this Court that Mrs. Roy would not have incurred an indebtedness of $1000.00 had she not been influenced by the ratification by plaintiff of the transfers she (Mrs. Roy) had made, and believed that plaintiff no longer objected to her handling her property as she saw fit.

"When a party intends to rescind a contract on the ground of the violation of it by the other party, he must do so promptly on the first intimation of such breach. If he negotiates with the other party, with knowledge of the breach and permits him to proceed with the performance, it is a waiver of the right to rescind the contract."

Lawrence v. Dale, 3 Johns C. H. 23.

"If, however, a party having an interest to prevent an act being done, acquiesce in it and the position of

others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."

16 Cyc. 741.

"Where a person with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces or ratifies a transaction, or that he will offer no opposition thereto, and that other, relying upon such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice."

16 Cyc. 791.

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled."

16 Cyc. 805.

"When a party having objections to a contract afterwards, without fraud or duress, ratifies the same, he has no claim for relief."

Perry v. Pierson, 30 Ill. App. 389.

Edwards v. Hanley, 3 Ky. 602.

Edwards v. Roberts, 15 Miss. 544.

STATUTE OF LIMITATIONS.

We wish to call the Court's attention to the fact that the original indebtedness was only $5875.00, whereas the interest amounts to approximately $16,000.00. Although the notes were outlawed at the time the release was entered into, the plaintiff con-

tends that the release took the notes out of the statute of limitations and that if Mrs. Roy at any time during her life, even if twenty years after the execution of the release, should mortgage or sell her property or incur an indebtedness of $1,000.00, the notes would immediately become due and payable. The statute of limitations would have no force or effect, if this Court should sustain such a contention.

Does this Court believe for one moment that Mrs. Roy ever intended to enter into a contract with her daughter whereby the notes could be revived at any time during her life? Why should she enter into such an agreement when she must have known the notes were outlawed and that she did not have to pay them unless she so desired? It is very evident that she executed the release simply because she desired to abide by the wishes of her daughter in not mortgaging or selling her property or incurring an indebtedness of more than $1000.00, and that she did not intend by such release, under any circumstances, to renew the notes which the plaintiff had by plain and clear language discharged and which Mrs. Roy knew were outlawed.

We do not believe that this Court will, on such a state of facts, hold that the statute of limitations was extended indefinitely and that the acts of Mrs. Roy renewed and revived the obligation which had been so solemnly discharged by the plaintiff.

DISCUSSION OF PLAINTIFF'S AUTHORITIES.

Plaintiff's entire argument and the authorities cited in support thereof are based upon the assumption that contracts in restraint of trade are only void when they refer to commercial business or a profession and that courts recognize that the restraining of an individual in his right of contract—no matter how severe, unreasonable and unconscionable—is valid; but plaintiff has failed to cite any cases holding that such is the law.

The case of *Hubbard v. Miller,* 25 Mich. 15, cited on page 14 of plaintiff's brief, even if it were good law, would not be applicable in the case at bar because the restraining of Mrs. Roy from contracting a debt of more than $1000.00, or from disposing of any of her realty, was not just or honest or for the protection of the legitimate interests of Mrs. Roy; but was forced upon her by the plaintiff, her daughter, for the sole purpose of preventing Mrs. Roy from disposing of her property as she saw fit, in order that she, the plaintiff, might benefit as an heir of Mrs. Roy on her death.

Plaintiff admits on page 14 of her brief that the main question is whether the restraint is itself the main object of the contract or ancillary to a main lawful purpose, and that if the restraint itself is the main object, then it would be against public policy and could not be enforced. Certainly, no one could successfully contend that the restraining of Mrs.

Roy from disposing of her property was not the main object of the contract entered into by and between plaintiff and Mrs. Roy. The claim of plaintiff against Mrs. Roy was outlawed at the time the release in question was entered into and could not be enforced by plaintiff, and the only object plaintiff could possibly have had was to prevent Mrs. Roy from disposing of, or incumbering, her property or incurring indebtedness in order that she (plaintiff) might benefit thereby as one of Mrs. Roy's heirs.

The viciousness of the release was the fact that there was no consideration for its execution. Mrs. Roy did not receive or derive any benefit whatsoever, directly or indirectly, by the execution of the release.

Certainly there can be no merit to the contention of plaintiff that the common law governing the restraint of trade does not apply to an individual; but only to those who are engaged in commercial or professional business. It is just as important to the public that individuals not engaged in any particular business have the same freedom of contract as those engaged as tradesmen. The courts certainly could not make any valid distinction.

Plaintiff seems to place great reliance upon the fact that the release was a transaction between two individuals and, therefore, could not possibly have any injurious influence on the community at large. We are unable to follow any such specious reasoning, as the public is interested materially in seeing that every citizen is allowed to transact business

with whom they please, so long as the transaction is lawful; otherwise, contracts of this kind might seriously clog the channels of business in any community.

Justice Coke in rendering his decision in this case, which was concurred in by Justice Quarles, holding that the release was in restraint of trade and against public policy and therefore void, cites the following references:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim." 9 Cyc. 546. See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264.

"Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare." 6 R. C. L. 712.

"Whether a contract is against public policy is a question of law for the court." 9 Cyc. 483.

"The * * * question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party *in favour of whom it is given*, and not so large as to interfere with the interests of the public. Whatever restraint *is larger than the necessary protection of the party, can be of no benefit to either*; it can only be oppressive; and if

oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." *Horner v. Graves,* 151 Eng. Rep. 287; 6 R. C. L., p. 789.

Justice Coke, in speaking of the reasons for the release being void and against public policy, says:

"The growth of commerce and the usages of trade demand a free exercise of the right to extend credit and to have credit extended; to enjoy the right to borrow as well as the right to lend; and unless there appears some clear and positve benefit to accrue to the covenantee by reason of the subversion of these rights, a contract to that effect will be held an unreasonable restraint of trade and void because against public policy.

"The state has a general interest in the freedom of its people in the exercise of their legal and natural rights and any contract that tends to curtail those rights without any benefit to the restrainor is against public policy. The right to borrow has been recognized for ages. The commerce of the world is conducted largely on credit, and while the disposition to incur indebtedness may in some instances prove harmful, yet the right to borrow is universally recognized as a valuable privilege often indulged, and not infrequently to the great benefit and advantage of the borrower. It is not an over-statement to say that countless firms and individuals and even nations, are constantly being saved from financial wreck and disaster by timely recourse to this privilege."

THE FACTS IN THE CASE AT BAR SHOW THE RESTRAINT TO BE UNREASONABLE, UNJUST AND INJURIOUS TO THE PUBLIC.

Every authority cited by plaintiff enunciates the principle that a restraint of the right of contract to

be valid must be just, honest and for the protection of the legitimate interests of the party in whose favor the restraint is imposed. None of these elements necessary to constitute a valid restraint can be found in the case at bar, as is apparent from the following facts:

1. That at the time the release was executed by plaintiff and Mrs. Roy the notes were outlawed and there was no reason for the execution of the release, other than the unlawful restraining of Mrs. Roy from the exercise of her right of contract;

2. That Mrs. Roy did not at the time of the execution of said release, or at any time subsequent thereto, receive any benefit or consideration of any nature whatsoever for the execution of the same;

3. That the only party receiving any benefit whatsoever from the execution of said release was the plaintiff, who would benefit as an heir of Mrs. Roy by preventing Mrs. Roy during her lifetime from disposing of or incumbering her estate;

4. That said release was unreasonable in that it prevented Mrs. Roy from disposing of any of her property or incurring an indebtedness of over $1000.00 at any time during her lifetime without the consent of plaintiff; thereby abridging her natural right of contract;

5. That said release was unjust, unreasonable and unconscionable in that it prevented Mrs. Roy from incurring any indebtedness over $1000.00 should it become necessary to protect her estate;

6. That the only and sole purpose and object of

said release was the restraining of Mrs. Roy from disposing of her property or incurring an indebtedness of over $1000.00 without the consent of plaintiff;

7. That prior to the time said alleged indebtedness of over $1000.00 was incurred by Mrs. Roy, plaintiff had ratified sales of property which she (Mrs. Roy) had made without the consent of plaintiff and, by such ratification, led and induced Mrs. Roy to believe that plaintiff no longer relied upon the conditions subsequent of said release;

8. That said release affected the public materially and was against public policy as it prevented Mrs. Roy from exercising her inate right of contracting with whom she pleased.

We are unable to cite the pages of the transcript of evidence showing the facts above stated, as we have been unable to obtain a copy of the same. However, we will endeavor to point out to the Court in our oral argument the facts appearing in the transcript substantiating the aforesaid statements.

If the contract entered into by and between plaintiff and Mrs. Roy is not against public policy and void, as being in restraint of trade, then it would be possible for a few wealthy and influential men to clog the channels of trade to such an extent that the commercial business of a community would become stagnant. One would think from the argument of plaintiff that all of the business of the world was done by professional men and tradesmen and that individuals took no part in commerce. Right here

in our small community we have men who are not in any manner whatsoever connected with a trade or a profession, yet they are transacting business deals daily involving many thousands of dollars. Would it be any more harmful to the public to tie up a groceryman and prevent him from trading than it would be to tie up one of these wealthy men and prevent him from doing business?

The principles and reasons for prohibiting contracts in restraint of trade are as much applicable to individuals as to tradesmen. Simply because we are unable to find a case "on all fours" with the one at bar does not weaken our argument in the least that every case cited by plaintiff in support of her contention, upholds the opinion of our Supreme Court THAT THE CONTRACT ENTERED INTO BETWEEN PLAINTIFF AND MRS. ROY WAS VOID, AS BEING AN UNREASONABLE RESTRAINT OF TRADE AND AGAINST PUBLIC POLICY. No doubt, our failure to find a case directly in point is due to the fact that plaintiff is the only one who has ever endeavored to uphold in a court of law such an unreasonable, unconscionable and unfair restraint.

AUTHORITIES UPHOLDING DEFENDANTS' CONTENTION THAT THE RELEASE IS VOID AND AGAINST PUBLIC POLICY, BEING A RESTRAINT OF TRADE.

Chitty, in speaking of agreements in restraint of trade, said:

"An agreement to be good *must not be unreasonable,* that is, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made, and when the agreement imposes a restraint larger than this, *it is unreasonable and void as being injurious to the interests of the public.* The reasonableness or unreasonableness of a contract is not a matter to leave to the jury, but a point of law for the court."

Chitty on Contracts, p. 576.

As we have discussed fully the unreasonableness of the release and its injurious nature to the public, we will not further burden the Court by reiterating.

Parsons on Contracts (7th Ed., Vol. 2, p. 753) says that an agreement not to carry on a certain business within the state is void as being against public policy and an unreasonable restraint.

The contract entered into between the plaintiff and Mrs. Roy, not only prohibited Mrs. Roy from incurring an indebtedness of more than $1000.00 and from transferring her property within the Territory of Hawaii without the consent of plaintiff; but prohibited her from incurring any indebtedness exceeding $1000.00 or from transferring any of her property in any place in the United States or, for that matter, in the world. If such a restraint is not unreasonable, unconscionable and against public policy, then we are at a loss to know when a restraint would be against public policy and void.

Waldo Pollack in his work on contracts (3rd Ed.,

p. 468), in discussing this question, lays down the following proposition:

"As the law is laid down now, it is sufficient justification and, indeed, the only justification *if the restriction is reasonable,* that is, *in reference to the interests of the parties concerned and reasonable in reference to the interests of the public.*

"An agreement between several master manufacturers to regulate their wage and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishment by the decision of the majority of their number, is in general *restraint of trade* as depriving each one of them of the control of his own business.

In the case of *Mitchell v. Reynolds,* ... Mass. (1837), the court sets forth the following reasons for not allowing unqualified restraint:

"1. Such contracts injure the parties making them because they diminish their means of procuring livelihoods and a competency for their families; they tempt incompetent persons, for the sake of gain, to deprive themselves of the power to make future acquisitions and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community, as well as themselves. 3. They discourage industry and enterprise and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. They expose the public to all the evils of monopoly."

As the release entered into between plaintiff and Mrs. Roy tied her hand and foot so far as the handling of her property was concerned, it certainly discouraged industry and enterprise; prevented com-

petition and exposed the public to the evils of monopoly. When Mrs. Roy's property was taken off the market by the unreasonable restraint imposed upon her by plaintiff, it naturally increased the value of other property. In other words, if such a contract was entered into by a hundred persons in a community holding large interests, it would amount to practically a monopoly and greatly increase the saleable value of other property in that locality.

In the case of *Pipe v. Thomas,* 7 Am. Dec. 741, it was held:

"An agreement to restrain a party from pursuing his trade in any part of the country, is void, as against public policy."

The following cases hold that whether a contract in restraint of trade shall be valid or not depends upon three considerations. 1. If the restraint be partial; 2. If founded upon a good consideration; and 3. If it be reasonable and not oppressive.

Thomas v. Miller, 3 Ohio St. 275.
Bremer v. Marshall, 4 Green Ch. 537.
Wright v. Ryder, 36 Cal. 357.
Holbrook v. Waters, 9 How. Pr. 353.

In *Callahan v. Donnelly,* 45 Cal. 152, it was held that a contract in restraint of trade must designate the space within which it is to operate; it must not be unreasonably extended. Such contracts, when upheld, are only in cases *where the parties have restricted the territory* in which they are to operate,

and where the court, in considering the nature of the business in connection with the territorial limits assigned, is of the opinion that the designated limits are not unreasonable in extent, so, that whether a contract is in restraint of trade or not, is a question of law, to be determined by the court and not a question for the jury.

Mallan v. May, 11 M. & W. 653.
Keller v. Larkin, 3 Chand. 133.
Horner v. Graves, 7 Bing. 743.

The following cases hold that contracts in general restraint of trade are void at common law:

Pike v. Thomas, 7 Am. Dec. 741;
Alger v. Thatcher, 31 Id. 119.

Plaintiff also raises the point that because Mrs. Roy could, by electing to pay the notes, transfer her property and incur an indebtedness exceeding $1000.00, that *it was not in any way a restraint of her right to contract.*

The case of *DePeyster v. Michael,* 57 Am. Dec. 471, discusses this question thoroughly and lays down the law that the condition that a grantee shall not alien without paying a sum of money therefor is an unlawful restraint of alienation. The court in the conclusion of its opinion, says:

"Upon the highest legal authority, therefore, it may be affirmed that in a fee-simple grant of land, a condition that the grantee shall not alien or that he shall pay a sum of money to the grantor upon alienation, is void on the ground that it is repugnant to the estate granted."

The same reasoning would apply to contracts in the restraint of trade. The mere fact that a party could, by paying a fine, avoid the restraint, would not validate the contract and take it out of the rule that it is against public policy. There is always bound to be some condition of forfeiture to every restraint. It would be impossible to restrain a man from doing something without providing for some penalty in the event he disobeyed the contract of restraint.

If the Court will read the DePeyster case, it will find the question discussed thoroughly.

Plaintiff also raises the point, and seems to lay great stress upon it, THAT THE SUPREME COURT ERRED IN NOT HOLDING AND DECIDING THAT THE FAILURE OF DEFENDANTS TO GIVE NOTICE OF THEIR INTENTION TO RELY UPON THE DEFENSE OF ILLEGALITY AS REQUIRED BY RULE 4 OF THE CIRCUIT COURT RULES, BARRED DEFENDANTS AND THE COURT FROM CONSIDERING SUCH DEFENSE IN THIS CAUSE, citing *Pahia v. Maguil,* 11 Haw. 530, 533.

The case cited by plaintiff is not in point because, in that case, the defendant endeavored to set up as a defense an immoral consideration, without pleading it in his answer. In the Pahia case there was nothing on the face of plaintiff's complaint showing that the contract was based on an immoral consideration and, naturally, the plaintiff had no notice that the defendant intended to rely upon such a defense, hence it was incumbent upon the defendant to plead

it. The same is true of the case of *Kapela v. Gilliland,* 22 Haw. 655.

The facts in the case at bar are not at all similar to the facts in the Pahia case, because plaintiff's complaint shows on its face that the contract under which she was endeavoring to collect the notes was in restraint of trade and against public policy, and it was not necessary for the defendants to set up a defense of which plaintiff already had knowledge.

We wish to call attention to the following extracts from the opinion of the Supreme Court of the Territory of Hawaii in the case at bar, on this phase of the question, which, in our humble opinion, settles the question so far as this Court is concerned, notwithstanding the Paia and Kapela cases:

Coke, J: "There is another phase of this case which, while almost ignored in the court below and in the briefs and argument of counsel before this court, demands consideration, and that is the question of the validity of the clause in the agreement between Eliza Roy and plaintiff herein restraining Eliza Roy from incurring indebtedness at any one time to the amount of one thousand dollars or upwards without the written consent of plaintiff. Under other circumstances we might feel constrained to ignore all questions not properly urged for our consideration by counsel. But in this case the agreement is before us and plaintiff can only prevail upon its strength and validity. If we find that the condition in the agreement, for the violation of which plaintiff must depend solely for judgment

in this case, is for any reason void, we conceive it to be our duty to so declare."

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim." 9 Cyc. 546. See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264.

"Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare." 6 R. C. L. 712.

"Whether a contract is against public policy is a question of law for the court." 9 Cyc. 483.

It seems to us that as the law is so well settled as to what contracts are in restraint of trade and against public policy, it would only be taking up the time of this Court to cite any further authorities. Any authorities that might be cited, either by the plaintiff or the defendants in this case, would not, in our humble opinion, throw much light on the question involved, as it is largely a question of fact, more than one of law, as to whether or not a contract is in restraint of trade and against public policy.

Although we do not have the transcript of evidence to refer to, we have endeavored to quote the evidence correctly and show that the contract entered into between plaintiff and Mrs. Roy was unreasonable, in restraint of trade and against public

policy. Mrs. Roy received absolutely no consideration whatsoever for the execution of the instrument, and not only tied herself up in a contract whereby she was prohibited from exercising her inate right of contract, but signed an agreement purporting to renew notes which were outlawed and which she did not have to pay. It should not be overlooked that although the original claim of plaintiff was only about $5000.00, at the present time the interest has brought it up to approximately $20,000.00.

The restraint was not limited to time or place; but was so broad and extensive in its terms as to prohibit Mrs. Roy from incurring an indebtedness of over one thousand dollars during her lifetime without the consent of plaintiff. If this contract is not unreasonable, unjust and unconscionable, then we would appreciate it if counsel for plaintiff would point out one that is.

CONCLUSION.

We most respectfully submit that, in view of the facts in this case and the law governing the same, the judgment in behalf of the defendants should be sustained.

Respectfully submitted,

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WM. B. PITTMAN,
Attorneys for Defendants-in-Error.

Dated, Honolulu, T. H.,
October 1, A. D. 1917.